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REVIEW OF PRESIDENTIAL ACTION

Many American students of public law have become disturbed by a tendency which has become apparent in the jurisprudence of our courts to refuse to review directly action of the President. While our courts have never hesitated to review the action of officers in the Executive branch, they have been most reluctant to control the legality of acts of the head of the Executive branch himself. "The President," stated a majority of the Supreme Court in 1948, "both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." *Chicago & Southern Airlines v. Waterman S.S. Co., 333 U.S. 103,* 111 (1948).

Nothing contained herein shall be construed as the action of the American Bar Association unless the same shall have been first approved by the House of Delegates or the Board of Governors.

The leading case is *Mississippi v. Johnson,* 4 Wall. 475, decided in 1866. That case involved an action to enjoin the President from carrying into effect an Act of Congress alleged to be unconstitutional. The Supreme Court held that such an action could not be maintained. "We are fully satisfied," reads the opinion, "that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be entertained by us." (501). Since this case, it has generally been assumed, as a basic principle of American law, that a federal court may not issue an injunction against the President. This principle tends to place presidential action in an unreviewable position, for the action for an injunction is the basic remedy, in the absence of statutory provisions for review, to secure review of Executive action by the federal courts in the United States. As it has been expressed by Mr. Justice Jackson, the presidential office is "relatively immune from judicial review." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 654 (1952).

The reluctance of American courts to review the legality of acts of the President stems from a perverted construction of the doctrine of the separation of powers. "The Congress," the Supreme Court has stated, "is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department." *Mississippi v. Johnson,* 4 Wall. 475, 500 (U.S. 1866). For the courts to attempt to control the legality of presidential action would, in this view, amount to undue interference by the judiciary with the workings of a coordinate, independent branch of the government.

The separation of powers interpreted in this way is, in effect, the opening wedge to a system of government foreign to Anglo-American conceptions. It places the head of the Executive beyond judicial control, which, in practice, means that his acts are not subject to law. Such a construction of the separation-of-powers doctrine is neither desirable nor justified. It is erroneous to assert that the American courts are interfering unduly in the operation of another department when they review the legality of presidential action. The essence of judicial power is the application of the law in cases presented to the courts for decision. The fact that the head of the Executive happens to be a party in a given case does not mean that a court, in deciding that case, is exercising other than purely judicial power.

The decision of the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952)—the celebrated steel seizure case—indicates that it is becoming aware of the need for avoiding the dangers inherent in the doctrine that acts of the head of the Executive cannot be reviewed. It is true that the Court did not expressly repudiate the principle that the federal courts cannot enjoin the President. But, even though the Court continued to pay lip-service to that principle, it did nonetheless assert an effective review power over the Chief Executive by a liberal application of the doctrine of an earlier case, *Williams v. Fanning,* 332 U.S. 590 (1948). In that case, the Court held that the Postmaster General was not an indispensable party in an action to enjoin a local postmaster from carrying out the provisions of an order not to deliver mail to plaintiff, although all that the postmaster was doing was to carry out the orders of his departmental superior. The President, like the Postmaster General, acts in practice through subordinate officials. Under *Williams v. Fanning,* the subordinates through whom the President acts can be enjoined from executing illegal presidential orders. This enables the American courts to review the legality of acts of the President, without the need for formally ordering the head of the Executive to do, or to refrain from doing, anything.

This is, in fact, the approach which was followed by the federal courts in the steel seizure case. The action in that case was brought against the Secretary of Commerce to restrain him from carrying out the President's order directing him to take possession of and operate the plants and facilities of the nation's steel industry. The defendant claimed that the federal courts were without power to negate action of the President, relying upon the principle that

the judiciary would not attempt directly to control the President. "But," said Judge Pine, in his now-famous opinion in the District Court, "in this case the President has not been sued. Charles Sawyer is the defendant, and the Supreme Court has held on many occasions that officers of the Executive Branch of the Government may be enjoined when their conduct is unauthorized by statute. . . . There is no doubt, therefore, that the defendant is subject to an injunction, and the President not only is not a party but he is not an indispensable party to this action, as held in *Williams v. Fanning,*" 103 F. Supp. 569, 575 (D.C. 1952). In upholding Judge Pine's decision, the majority of the Supreme Court clearly appears to have agreed with his opinion on this point. Indeed, even the dissenting Justices did not question the propriety of the injunction action against the Secretary of Commerce.

ADMINISTRATIVE ABUSE OF POWER

Review of administrative action in continental countries, like France, is distinguished from the system which prevails in the common-law world by, among other things, the power of the reviewing court in a country like France to set aside challenged administrative action for what is termed "abuse of power" *(détournement de pouvoir).* "An administrative authority commits an abuse of power," a prominent French jurist informs us, "when, though it performs an act within its jurisdiction, observes the proper procedures, and respects the provisions of statutes and regulations which govern its actions, it uses its authority for purposes other than those which the one delegating the authority to it had in mind. The abuse of power is a violation of the spirit of the law." Under the theory which the French system has developed, the powers which the administration possesses have been delegated to it by the legislature with certain goals in view. To deviate from these goals is for it to abuse the authority conferred. Abuse of administrative power, in the French theory, is thus the use by the administrator of his authority for an illicit purpose, for a purpose other than that which the legislator intended.

Administrative abuse of power, under the concept which has been developed in the *droit administratif,* is, as one authority tells us, "an abuse of an agent's mandate, an abuse of right." Looked at in this way, it is not surprising that nothing exactly like the French concept, as a separate ground of review, has been articulated by Anglo-American courts. In the common-law world, the notion of abuse of rights, which has been of ever-growing importance in civil-law countries like France, is one which has been almost completely rejected. "The theory of the abuse of rights is one which has been rejected by our law, with the result that the ancient brocard *(dura lex sed lex)* finds its most vivid illustration in the present-day decisions of the Anglo-American Courts." *Gutteridge, 5 Camb. L.J. 22 (1933).* The proposition that a legal right can be abused has not received the imprimatur of the common law. It merely asks what the defendant has done and not why he did it.

Under the concept of abuse of power, as it has been developed in the French sys-

tem, the reviewing court must ask, not only what the administration has done in the particular case, but also why it did it. The court must thus inquire into the motives which induced the challenged act and then determine whether the purpose which the administration had in mind squares with that of the legislature in delegating the given power. The question of abuse of power presupposes an inquiry into the mind of the agent, into his secret intentions which he has probably made every effort to conceal. It is precisely this type of inquiry into motives that the Anglo-American courts have refused to admit that they can make.

In investigating the question of abuse of power, the reviewing court must probe into the mental processes of the administrator in order to lay bare the motives which induced the challenged act. This the Anglo-American courts have consistently declined to do. It is not for our courts, as Chief Justice Hughes affirmed in the second *Morgan* case, (304 U.S. 1) to probe the mental processes of the administration. "Our duty is at an end," the American Court has stated, "when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress." *N.B.C. v. United States, 319* U.S. 190, 224 (1943).

The fact that the courts in the common-law world have not articulated a concept analogous to that of abuse of power, which has been developed in the *droit administratif,* does not, however, mean that they have not set aside administrative acts in cases which the French administrative lawyer would classify under the rubric of abuse of power. A well-known English case, that of *Rex v. Minister of Health;* ex parte *Davis,* [1929] 1 K.B. 619, is as good an example as any to show what is meant here. That case involved the power given to the Minister of Health to confirm schemes submitted by local authorities for improving slum areas. Under the relevant statute, such schemes were to provide for improving the slum area by rearranging and reconstructing the streets and houses therein.

In the *Davis* case, the scheme submitted by the local authority gave it the power to sell, lease, or otherwise dispose of the area in question. The authority there was intending to acquire compulsorily the particular area and then to dispose of same, as they saw fit, as corporation property, not, of course, for private profit or for any corrupt motive, but for what was deemed to be general municipal development and advantage, though not of the kind contemplated by this Act. The court in the *Davis* case held that the scheme at issue was clearly *ultra vires.* "Under the name, and the agreeable name, of an improvement scheme," reads the decision of Lord Hewart, C.J., "this particular council is minded to acquire a slice of very valuable land in the heart of the city of Derby, not for any purpose of rearrangement or reconstruction, but for the purpose, if and when the local authority thinks fit, of resale, and, of course, resale at the highest obtainable price." (624).

In setting aside the administrative action in the *Davis* case, the court decided only that a scheme which did not provide for rearrangement and reconstruction was

ultra vires the enabling statute. A French administrative lawyer could, however, well classify it under the concept of abuse of power. The administration there was motivated not by a desire to improve the slum area, which was the purpose for which the legislatutre had delegated the power to acquire land compulsorily, but by its own financial interest, just as was the case in some of the French decisions which have been rendered.

An American case which has similar characteristics is *Morrill v. Jones,* 106 U.S. 466 (1883). The relevant statute there provided that "Animals, alive, specially imported for breeding purposes, from beyond the seas, shall be admitted free [of duty] upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he may prescribe." Among the regulations issued under this section was one which required the official concerned, before admitting such animals free, to be "satisfied that the animals are of superior stock adapted to improving the breed in the United States."

This provision, said the Supreme Court, was in excess of the power of the Secretary. "This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit, duty free, all animals specially imported for breeding purposes. The Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States." (467). Here, too, the French student might well find that the case involved an administrative abuse of power. If such a case were presented to it, the Council of State, the Supreme Court in the French system of administrative law, could well annul the regulation at issue because the Secretary had used his powers for a purpose other than that which the legislature had in mind, however laudable his actual purpose may have been.

Most of the American cases of this type involve the authority which our courts exercise over the reasonableness of administrative exercises of the rule-making power. In this country, the judicial power to pass upon the *vires* of administrative sub-legislation carries with it the power to pass upon its reasonableness. "Not only must a regulation, in order to be valid, be consistent with the statute, it must be reasonable." *Manhattan General Equipment Co. v. Commissioner,* 297 U.S. 129, 134 (1936). In exercising their authority to determine the reasonableness of regulations, the American courts look to see if there is a rational relationship between the particular regulation and the governing statute. This permits our courts to exercise a control similar to that exerted by the French Council of State under its concept of abuse of power. For the required rational relationship clearly does not exist when a challenged regulation has been promulgated for a purpose other than that which the legislature had in mind. As it has been expressed by one American court, "Such rules and regulations must be reasonably appropriate and calculated to carry out the legislative purpose." *Wallace v. Feehan,* 206 Ind. 522, 533 (1934).

Yet, even with this admitted, there is still nothing like the French concept of

abuse of power in American administrative law. In the first place, our courts will normally not make an inquiry into the reasonableness of administrative action except in the case of rules and regulations. And even insofar as such administrative sub-legislation is concerned, the motion of reasonableness is not nearly as clear as the concept of abuse of power. Although there are, in our law, cases which are similar to those involving abuse of power in France, the American courts have never worked out a definite concept of abuse of power such as the Council of State has done. It thus seems clear that abuse of power, as such, cannot be classified as a separate ground of review in Anglo-American administrative law. (For an interesting recent case illustrating this, see *Harper v. Jones,* 195 F. 2d 795 (10th Cir. 1952) *reversing* 98 F. Supp. 460 (W.D. Okla. 1951)).

SUPREME COURT

Administrative vagueness.—In *Boyce Motor Lines* v. *United States,* 342 U.S. 337 (1952), discussed in Vol. 4, No. 3, p. 62, of this Bulletin, Justice Jackson had dissented on the ground that the administrative regulation there at issue was too vague to lay down a clearly defined pattern of conduct to guide those who were subject thereto. Justice Jackson's concern with the vagueness of administrative rules and orders, which, he has referred to as an example of "malaise in the administrative scheme" (343 U.S. at 482), has been manifested even more clearly in his dissent in *FTC v. Ruberoid Co.,* 343 U.S. 470, 480 (1952). The Commission there had instituted a proceeding charging petitioner with unlawfully discriminating in price between customers. A cease and desist order was issued which was not limited to the specific violations proven to have been committed. Instead, the Commission issued a sweeping general order to "cease and desist from discriminating in price; By selling such products of like grade and quality to any purchasers who in fact compete with the favored purchaser in the resale or distribution of such products." This was, in effect, merely to parrot the language of the relevant statute and, accompanied as it was by no opinion and "only the most cryptic reasons in its findings" (Id at 481), the FTC order was certainly far from the well-rounded reasoned decision that Anglo-Americans have come to expect from those exercising adjudicatory authority.

Most students of federal administrative law know that the skeleton-type order involved in this case is typical of those issued by the FTC. This is true despite the constant criticisms which have been directed against the Commission's practice in this respect. It is unfortunate that, in a case like the instant one, the majority of the Court did not see fit to pronounce any strictures against the vagueness of the Commission's order. Justice Clarke contented himself merely with the statement that the scope of its order was for the FTC to determine.

To Justice Jackson in his dissent, the question of specificity of the administrative order was the key issue in the case. In his view, the function of an agency like the FTC is the development and refinement of policies which Congress can indicate

only in a general way. This purpose is frustrated if the agency's regulations and orders are no clearer than the statute itself. See Note 66 Harv. L. Rev. 89, 152 (1952). "Admitting that the statute is 'vague and general in its wording,' it does not follow that a cease and desist order implementing it should be." 343 U.S. at 481.

The enabling Act in this case, says Justice Jackson, like many regulatory measures, sketches a general outline which contemplates its completion and clarification by the administrative process before court review or enforcement. In such cases, the legislation is unfinished law which the administrative body must complete before it is ready for application.

Such a statutory scheme presupposes that the administrative agency will perform the function of completing the unfinished law which the Congress has passed. Only where the law is not yet clear of policy elements and therefore not ready for mere executive enforcement is it withdrawn by Congress from the executive department and confided to independent administrative agencies. If the tribunal to which such discretion is delegated does nothing but promulgate as its own decision the generalities of its statutory charter, the rationale for placing it beyond executive control is gone.

The quasi-legislative function, the learned Justice goes on, of filling in blank spaces in regulatory legislation and reconciling conflicting policy standards must neither be passed on to the courts nor assumed by them. A court in reviewing a case under the tax law or the patent law, where the legislative function has been exhausted and policy considerations are settled in the Acts themselves, follows the same mental operation as the executive officer and determines on the facts whether there results an obligation to pay a tax, or there is a right to a patent. Very different, however, is the review of a determination by an independent agency with "quasi-legislative" discretion in its armory. There the court does not decide whether the correct determination was reached. So far as the courts are concerned, a wide range of results may be equally correct. It is plain that, if the scheme of regulating complicated enterprises through unfinished legislation is to be just and effective, we must insist that the legislative function be performed and exhausted by the administrative body before the case is passed on to the courts. "No doubt it is administratively convenient to blanket an industry under a comprehensive prohibition in bulk—an undiscriminating prohibition of discrimination. But this not only fails to give the precision and concreteness of legal duties to the abstract policies of the Act, but it really promulgates an inaccurate partial paraphrase of its indeterminate generalities." Id. at 492.

With the *Ruberoid* case should be compared *FTC v. Motion Picture Adv. Serv. Co.*, 73 Sup. Ct. 361 (1953). In that case, where the majority of the Court (including, surprisingly enough, Justice Jackson) upheld an FTC order, Justice Frankfurter, in dissent, contended that the Commission had not related its analysis of the industry involved to the standards of illegality in section 5 of the FTC Act with sufficient clarity to enable the Court to review the order.

The Commission, he asserts, merely stated a dogmatic conclusion that the use of the exclusive exhibition contracts involved in the case constituted an "unreasonable restraint and restriction of competition." If judicial review is to have a basis for functioning, the Commission must do more than to pronounce a conclusion by way of fiat and without explication. Compare *King v. United States,* 73 Sup. Ct. 259 (1952), another case where a minority of the Court thought that an agency had not adequately articulated the basis of its action.

Right to be heard.—An important decision on procedural due process in administrative proceedings is *Kwong Hai Chew v. Colding,* 73 Sup. Ct. 472 (1953). The Court there held that the Attorney General's power under a regulation to bar, without hearing during the national emergency, the entry of aliens into the United States whose presence was deemed inimical to national security, provided that the Attorney General determined that the order was based upon confidential information the disclosure of which would be prejudicial to the public interest, did not include the power to exclude summarily a lawful permanent resident alien returning from a voyage to foreign ports. The Court stated that it did not regard the constitutional status which the alien indisputably enjoyed prior to his voyage as terminated by that voyage. From a constitutional point of view, he is entitled to due process without regard to whether or not for immigration purposes, he is to be treated as an entrant alien. While it may be that a resident alien's right to remain in the United States is subject to alteration by statute or regulation because of a voyage undertaken by him to foreign ports, it does not follow that he is thereby deprived of his constitutional right to procedural due process. His status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him.

APA: Applicability.—The most significant 1952 case on the applicability of the Federal APA, since it indicates a partial retreat by the highest court from its decision in *Wong Yang Sung v. McGrath,* 339 U.S. 33 (1950), is *United States v. L.A. Tucker Truck Lines* 344 U.S. 33 (1952). It involved an application to the ICC for a certificate of public convenience and necessity to authorize the extension of an existing motor route. A railroad and eleven motor carriers, including appellee, intervened to oppose. After hearing, the Commission granted the certificate, and appellee petitioned the district court to set aside its action. Here, for the first time, appellee contended that the ICC's action was invalid because the examiner who had presided at the hearing had not been appointed pursuant to section 11 of the APA. The district court upheld this contention, but was reversed by the Supreme Court.

Although recognizing that the Court had held in *Riss & Co. v. United States,* 341 U.S. 907 (1951), that hearing officers on applications for certificates of convenience and necessity before the ICC are subject to the provisions of the APA, Justice Jackson asserted that that decision established only that a litigant in such a case who does make such a demand at the time of hearing is entitled to an examiner chosen as the Act prescribes. Orderly procedure and

good administration, however, require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. Courts should not topple administrative decisions unless the agency not only has erred but has erred against objection made at the time appropriate under its practice. The defect in the examiner's appointment, in the Court's view, was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection made during the hearing. But it was not one which deprived the ICC of power or jurisdiction, so that, even in the absence of timely objection, its order should be set aside as a nullity.

There were strong dissents by Justices Frankfurter and Douglas, who urged that the Court's decision was inconsistent with the *Wong Yang Sung* case. In their view, the APA created unwaivable limitations upon the power of administrative agencies, as much so as do the definitions in judiciary acts of the different categories of cases which different courts are empowered to hear and decide. The limitations upon the power of the ICC to act, imposed by the command that it must do so only in accordance with the requirements of the APA, are thus not within the dispensing power of any litigant. They bind and confine the Commission itself.

Res judicata:—In *FTC v. Motion Picture Adv. Serv. Co.*, 73 Sup. Ct. 361 (1953), respondent was a motion picture producer and distributor who had contracts with theatre owners which provided that the latter would display only the films furnished by respondent. The FTC issued a cease and desist order which prohibited respondent from entering into any such exclusive exhibition contracts for longer than a year. On review of the Commission's order, respondent urged that the sole issue raised in the FTC's complaint had been adjudicated in a former proceeding instituted by the FTC which resulted in a cease and desist order. But, said the Court, that was a proceeding to put an end to a conspiracy between respondent and other distributors involving the use of these exclusive agreements. The present proceeding charges no conspiracy; it is directed against individual acts of respondent. The plea of *res judicata* is therefore not available since the issues litigated and determined in the present case are not the same as those in the earlier one.

Primary jurisdiction.—Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952), raised questions concerning the power of the courts to protect Negro railroad employees from loss of their jobs under compulsion of a bargaining agreement which defendant railroad made with an exclusively white man's union. The agreement referred to, made with a white Brotherhood representing brakemen, provided that train porters should no longer perform brakemen's duties, and, as found by the Court, would have the effect of abolishing the jobs of Negro train porters who performed substantially the same duties as brakemen. The action was brought by a Negro train employee, on behalf of himself and other colored employees similarly situated, for a decree that the agreement in question was void and unenforce-

able and for injunctive relief. Defendants contended that the complaint raised questions which Congress had made subject to the exclusive jurisdiction of the National Mediation Board and the National Railway Adjustment Board.

The Court held, however, that the primary jurisdiction doctrine did not bar the granting of judicial relief. The colored workers here must look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the Act. For no adequate administrative remedy can be afforded by the Mediation or Railway Adjustment Board. The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under *Slocum v. Delaware L. & W. R. Co.*, 339 U.S. 239 (1950). This dispute involves the validity of the contract, not its meaning, a question which is clearly for the courts, not the Board.

Availability of review.—The question of when a particular administrative act is sufficiently ripe for review of it to be sought is one with which the Supreme Court has been much concerned in recent years. In *Public Service Commission of Utah v. Wycoff Co.*, 73 Sup. Ct. 236 (1952), the answer to that question was easier than it usually is in cases which reach the highest tribunal for decision. Complainant there was engaged in the transportation of motion picture film and newsreels between points in Utah. The complaint sought a declaratory judgment against the Utah Public Service Commission that the transportation within the state was so integrated with interstate movement that it constituted interstate commerce. Injunctive relief against interference with such transportation was also sought. The complaint alleged that the Commission threatened to stop and prevent the plaintiff from transporting the film and newsreels. The Court held, however, that, on the record, the Commission's action was not shown to have matured to the point where judicial relief against it was necessary.

The complaint, said Justice Jackson, does not seek review of any particular administrative act. It does not ask a judgment that the Commission is without authority to make any specific order or take any concrete regulatory step. It seeks merely to establish that complainant's transport of goods is interstate commerce. "One naturally asks, so what? To that ultimate question no answer is sought." The declaratory judgment procedure will thus not be used to preempt and prejudge issues that are committed for initial decision to an administrative agency any more than it will be used as a substitute for statutory methods of review.

Role of reviewing court.—In *NLRB v. American Nat. Ins. Co.* 343 U.S. 395 (1952) the Court reiterated what it had said in *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951) with regard to the basic role of the Courts of Appeal in reviewing orders of the NLRB. It is plain, said the Chief Justice, that Congress charged the Courts of Appeal, not the Supreme Court, with the normal and primary responsibility for reviewing the conclusions of the Board. This rule was especially applicable in a case like the instant one, where the correctness of a finding of refusal to bargain in good faith was at issue. A statutory

standard such as "good faith" can have meaning only in its application to the particular facts of a particular case.

Review in criminal proceedings.—The interesting question of whether a court in a criminal proceeding may review an administrative order which serves as a basis for the criminal penalty is raised in a dissent by Justice Jackson in *United States v. Spector,* 343 U.S. 169, 174 (1952). That case involved an indictment for violation of that provision of the Internal Security Act which provides that an alien against whom an order of deportation is outstanding shall be guilty of a felony if he shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure. The question raised by Justice Jackson was whether, in such a proceeding for violation of this provision, the Act was not constitutionally defective because of its failure to permit the court to pass on the validity of the deportation order.

An administrative order, such as a deportation order, is not made by procedures constitutional for judgment of crime. Indeed, administrative determinations of liability to deportation have been sustained as constitutional only by considering them to be exclusively civil in nature, with no criminal consequences or connotations. The adjudication that an alien is subject to deportation is not made either by a jury trial or a court decision. The finding that the alien is guilty of conduct subjecting him to deportation does not require proof beyond reasonable doubt but may be made on mere preponderance of evidence. And, on judicial review, the court considers only the question of whether the deportation order is supported by substantial evidence on the record as a whole. Yet, under the Act involved in the instant case, a deportation order is made to carry potential criminal consequences.

It is in this that is to be found the difficulty which inheres in the instant statutory scheme, said Justice Jackson. Having dispensed with important constitutional safeguards in obtaining an administrative adjudication that the alien is guilty of conduct making him deportable on the ground it is only a civil proceeding, the Government seeks to turn around and use the result as a conclusive determination of that fact in a criminal proceeding. This, says the learned Justice, it cannot do. Implicit in his dissent is the view that, in a criminal proceeding which is based upon an administrative order, there must be full review of that order. Otherwise, it might be argued, the accused is not being given the full trial to which he is entitled under the Sixth Amendment.

Investigatory power.—United States v. Cardiff, 73 Sup. Ct. 189 (1952), arose out of a conviction for violation of a provision of the Food, Drug, and Cosmetic Act pertaining to inspection of factories by agents of the Food and Drug Administration. Respondent had refused permission to authorized agents to enter and inspect his factory at reasonable hours. The Court affirmed a reversal of the conviction on the ground that the statute was too vague to inform the factory manager that, if he failed to consent to the inspection, he was guilty of a crime. Words which are vague and fluid, stated Justice Douglas, may be

as much a trap for the innocent as the ancient laws of Caligula. To the administrative lawyer, the case is significant primarily as an illustration of the basic principle that, in our law, there is no such thing as inherent administrative investigatory authority. The power of inquisition, like all other administrative power, must find its source in a grant from the legislature and may be exercised only within the limits laid down in the statutory delegation.

PROCEDURE ACT CASES

Applicability.—In the now-famous case of *Wong Yang Sung v. McGrath,* 339 U.S. 33 (1950), the Supreme Court held that deportation proceedings were subject to the requirements of the APA. Since that decision, however, despite the Court's strong opinion that deportation proceedings were of the very essence of what the APA was aimed at, the Congress expressly exempted such proceedings from the requirements of Sections 5, 7, and 8 of the APA, in the Supplemental Appropriations Act of 1951. In *Belizaro v. Zimmerman,* 200 F. 2d 282 (3d Cir. 1952), petitioner claimed that this exemption violated due process because it eliminated the requirements separating the functions of the investigating, hearing, and enforcement branches of the agency. The court held, however, that it was not unconstitutional to allow the same officer to be an investigating and a hearing officer. Desirable or not, such had been the case in many instances prior to the APA. It may well be that the elimination of these proceedings from the APA is undesirable. But it can hardly be thought to be unconstitutional, for it was a system with which the country lived for a very long time before the changes brought about by the APA were adopted.

It has been held that the procedure requirements of the APA do not apply, by its own express terms, to proceedings involving the selection and retention or discharge of employees in the executive branch of the Federal Government. *Deving v. Campbell,* 194 F. 2d 876 (App. D.C. 1952).

On the other hand, in *United States* v. *Libby, McNeil & Libby,* 107 F. Supp. 697 (D. Alaska, 1952), the establishment of an Alaskan Indian reservation by order of the Secretary of the Interior has been declared to be subject to the demands of the APA. Such establishment, says the court, partook more of the nature of an adjudication, resulting in an order, rather than the formulation of a rule. Since no statute requires that a hearing be held, it cannot be said that section 4 of the APA itself required the giving of notice. But the Constitution itself requires that an agency observe the essentials of due process in proceedings not comprehended by, or beyond the scope of the APA (citing *Wong Yang Sung v. McGrath,* 339 U.S. 33 (1950)). However laudable the court's desire to hold the administrative action in question to the procedural standards imposed by the APA, one wonders whether the decision does not involve an unwarranted extension of the principle of the *Wong Yang Sung* case.

Subpenas.—That a regional director of the NLRB does not have the authority to issue a subpena where no formal complaint had been issued is the basis of the

decision in *NLRB v. Anchor Rome Mills,* 103 F. Supp. 44 (N.D. Ga. 1952), denying a motion by the Board to enforce obedience to a subpena duces tecum. While the Board has an absolute right to issue subpenas when there is a hearing in process, there is no provision by statute or regulation authorizing such a subpena where no complaint has been filed. In the absence of such provision, the power to issue the subpena does not exist. Under section 3(a) of the APA, there is no authority for procedure such as that followed in this case in the absence of appropriate law and regulations creating and justifying such procedure.

Right to Counsel—According to one district court, a witness subpenaed to testify in an income tax investigation is not entitled to the presence and advice of counsel connected with or retained by the taxpayer whose tax liability is under question. *Torres v. Stradley,* 103 F. Supp. 737, (N.D. Ga., 1951). It seems not unreasonable, says the court, to exclude the taxpayer's counsel from the interrogation of a witness about the taxpayer's affairs. The witness' constitutional rights are amply protected so long as he can select counsel from all other attorneys. Under a contrary ruling it is easy to see that the Government's investigation might be seriously prejudiced.

One might not have too much difficulty with this holding were it not for the express provisions of section 6(a) of the APA. The court deals with it by asserting that there appears to be a clear distinction between orders directing a witness to appear before an examiner for a quasi-judicial body, such as the ICC, and those directing a witness to appear before a Government Agent for investigative and fact-finding purposes. Tax investigations, being wholly fact-finding in nature, are to be distinguished from administrative hearings in which legal rights of parties may be considered and determined. The implication is that section 6(a) of the APA does not wholly apply to a tax investigation of this type. But this is not the way section 6(a) is written. It gives an unqualified right of counsel to "any person compelled to appear in person before any agency or representative thereof" and in "any agency proceeding."

Burden of Proof—In *Eastern Motor Express v. United States,* 103 F. Supp. 694 (S.D. Ind. 1952), plaintiffs contended that an order of the ICC prescribing new rules regulating the leasing and interchange of vehicles was invalid for failure of the Commission to follow the provisions of the APA with respect to the burden of proof of the proponent of a rule or order. The court held, however, without amplifying, that the record disclosed ample compliance with all requirements of the APA including that of the burden of proof. It is difficult, indeed, to see how the provision of section 7 (c) of the APA relating to burden of proof can be of much practical effect upon judicial review, especially in a case involving rulemaking.

Concentration of functions.—In *NLRB v. Kanmak Mills,* 200 F. 2d 542 (3d Cir. 1952), respondents urged that section 5(c) of the APA was violated because the law clerk of the chairman of the Board had participated in the trial as a member of

the General Counsel's staff. The court held that, under the facts, there had been no improper mingling of prosecuting and decisional functions. Under the NLRB's training program for Board legal assistants, the law clerk in question had been detached from his duties with the Board and was completely under the direction of the general counsel during the trial of this case. The sole purpose was to give him the rounded out experience which would enable him to render better service in his work with the Board. There is not the slightest inference fairly permissible from this record that he had any connection with the decisional action of the Board in this matter, and there is no contention that he was involved in a factually related case or that there was such a case.

Recommended decisions.—Kenny v. United States, 103 F. Supp. 971 (D. N. J. 1952), involved an action to set aside a rate order of the ICC on the ground that the Commission's action in making its determination without awaiting a tentative decision and recommendation by the examiner was contrary to section 8(a) of the APA. The court held, however, that this was a case where the exception at the end of section 8(a), authorizing the omission of the recommended decision procedure in emergency cases, was applicable. This exception was intended to permit the omission of such procedure where, as here, the law imposes upon the agency the duty to proceed expeditiously. The Commission in its final report had stated that no "proposed report was served in this proceeding for the reasons that due and timely execution of our functions imperatively and unavoidably requires that there be no such report." This parroting of the language in the exception at the end of section 8(a) of the APA was held sufficient as a finding that the exception was applicable.

Findings.—According to *Atlanta & Saint Andrews Bay Ry. Co. v. United States,* 104 F. Supp. 193 (M.D. Ala. 1952), the finding requirement of section 8(b) of the APA is a restatement of the rule laid down in *Florida v. United States,* 282 U.S. 194 (1931). In the instant case, as in the *Florida* case, an ICC order was held invalid because of the inadequacy of the findings accompanying it. The Commission's report, declared the court, stated ultimate conclusions rather than basic findings.

License suspensions.—New England Air Express v. CAB, 194 F. 2d 894 (App. D.C. 1952), involved a petition by a large irregular air carrier for review of an order of the CAB suspending the Letter of Registration which permits it to operate. Petitioner claimed it was entitled to an evidentiary hearing prior to the action of the Board. But, says the court, the public interest appears to have justified petitioner's suspension and at least some of petitioner's violations were willful. For both of these reasons, the suspension hearing was not subject to the requirements of section 9(b) of the APA.

Availability of review.—According to the Court of Appeals for the Sixth Circuit, the APA does not change the rule of *A.F. of L. v. NLRB,* 308 U.S. 401 (1940), under which a court of appeals is without jurisdiction to review an NLRB order arising out of a representation proceeding. The

APA does not extend the courts' power of review to such orders as do not, merely by reason of their promulgation, affect or aggrieve the complaining petitioner. *Timken-Detroit Axle Co. v. NLRB*, 197 F. 2d 512 (6th Cir. 1952). See, similarly, on the power of a district court to review representation orders, *Mechanics Educational Society v. Schauffler*, 103 F. Supp. 130 (E.D. Pa. 1952), which asserts, however, that a different rule is applied where a substantial constitutional question is presented.

The exception at the beginning of section 10 of the APA which precludes review so far as agency action is by law committed to agency discretion was considered in *Chavez v. McGranery*, 108 F. Supp. 255 (S.D. Cal. 1952). According to the court there, the exception refers only to exercised discretion and does not mean that merely because a statute commits action to agency discretion, the right to judicial review does not exist to determine whether or not the discretion has been exercised. One wonders, indeed, whether, even with regard to exercised discretion, the exception should be taken literally. How can the reviewing court, under section 10(e)(B)(1) of the APA, set aside agency action for abuse of discretion, if review under the APA is entirely precluded by the exception at the beginning of section 10 wherever discretion is involved? Compare *Gutnayer v. McGranery*, 108 F. Supp. 290 (D.C. 1952).

OTHER FEDERAL CASES

Right to be heard.—The most significant decision on procedural due process in administrative law during 1952 appears to have been *Bauer v. Acheson*, 106 F. Supp. 445 (D.C. 1952), decided by a three-judge district court. It arose out of the action of the Department of State in revoking, through its agents in Paris, without notice or hearing, the passport of plaintiff, a naturalized American citizen. The Department failed to give any reason for its action, other than the statement that, in the opinion of the Secretary, "her activities are contrary to the best interests of the United States." Plaintiff brought this action against the Secretary of State asking for a declaratory judgment that the revocation of her passport without a hearing or advising her of the specific basis for the revocation was null and void and that defendant be enjoined from continuing to deny passport facilities to her without hearing or advising her of the bases for such denial. Defendant claimed that the issuance and revocation of passports is entirely within the realm of foreign affairs and as such within the absolute discretion of the executive branch.

This contention of administrative conclusiveness was rejected by the court. It is true, said Judge Keech, that the conduct of foreign affairs is a political matter within the discretion of the executive and legislative branches. There is, however, the recognized limitation on the power of the political departments that their acts must be within the Constitution and not in conflict with any provision thereof. In the instant case, plaintiff's freedom to travel outside the United States—in the court's view, a clear attribute of personal liberty under contemporary conditions—was adversely affected by the challenged administration ac-

tion. Since denial of an American passport has a very direct bearing on the applicant's personal liberty to travel outside the United States, the executive department's discretion, although in a political matter, must be exercised with regard to the constitutional rights of citizens, and, more particularly, with regard to the requirements of procedural due process.

It is clear, from the court's decision, that revocation of a citizen's passport without notice and hearing before revocation is without authority of law. Such a view would appear to be justified since the administrative decision in a case of this type is one which adversely affects the rights of the citizen. It may be argued that the citizen does not have any *right* to a passport, that it is, on the contrary, merely a *privilege* which may be accorded or refused by the Government on any terms which it wishes. If that were true, there would be no due process right to notice and hearing, for the constitutional safeguard is applicable only where so-called rights, and not mere privileges, are involved. Even if one accepts this right-privilege distinction, it is unreal today to hold that a passport is only a privilege granted entirely upon the sufferance of the State. Freedom to travel, as Judge Keech pointed out, is an essential attribute of personal liberty. Personal liberty to go abroad is particularly important to an individual whose livelihood is dependent upon the right to travel. And it is unreal to contend that denial of an American passport does not restrict the citizen's right to travel abroad. Legal rights may be violated by unlawful public action, although such action makes no direct demands on the individual.

Cook Cleland Catalina Airways v. CAB, 195 F. 2d 206 (App. D.C. 1952), involved a petition to review orders of the CAB denying an application for exemption from the requirements of the Civil Aeronautics Act and revoking petitioner's license as a non-certified irregular air carrier. The court held that petitioner did not have a right to an adjudicatory hearing. No hearing was required by the Constitution, said Judge Prettyman, as no existing business and no existing property was involved. The case did not present any question which might arise if the applicant had developed a business or acquired property by reason of the original registration or the original permissive regulations of the Board.

Under the Internal Security Act of 1950, no alien shall be deported to any country in which the Attorney General shall find that such alien would be subjected to physical persecution. In *United States ex rel. Chen Ping Zee v. Shaughnessy,* 107 F. Supp. 607 (S.D.N.Y. 1952), the court held that the alien is entitled to a hearing before the finding of the Attorney General is made. The finding in question was intended to be just what the statute's language imports, a finding of fact. As such, it can be made only after an investigation. In such an investigation, the alien is entitled to procedural due process. Procedural due process includes the right to a hearing and a reasoned, rather than an arbitrary, determination.

Compare *Angilly v. United States,* 199 F. 2d 642 (2d Cir. 1952) (no right in government employee to due process hearing in removal proceedings).

Bias.—In *NLRB v. Bryan Mfg.* Co., 196 F. 2d 477 (7th Cir. 1952), it was claimed that respondent was denied a fair hearing because of the bias and prejudice of the trial examiner. It was claimed that the examiner interfered with the examinations which respondent's counsel endeavored to conduct. As to this, the court stated, however, that the extent of such examination rested in the sound discretion of the examiner. Respondent also claimed that the examiner took over from the Board's counsel the questioning of witnesses and thus acted as a sort of "co-prosecutor." Here, too, the court held that bias was not shown. The procedural rules of the NLRB expressly authorize trial examiners to examine and cross-examine witnesses. The examiner, says Judge Kerner, is not required to sit by and permit a confused or meaningless record to be made. One of his functions is to see that the facts are clearly and fully developed.

Primary jurisdiction.—The tendency of the federal courts to carry the primary jurisdiction doctrine too far is illustrated once again by *Apgar Travel Agency v. International Transport Ass'n,* 107 F. Supp. 706 (S.D.N.Y. 1952). Plaintiff there, an independent ticket agency serving, among others, non-scheduled air carriers, brought suit under the anti-trust laws against an association of regularly certified air carriers. Alleging an unlawful conspiracy among defendants to restrain interstate trade and commerce in air passenger transportation and thus to destroy plaintiff's business because of its representation of non-scheduled carriers, the complaint asked for injunctive relief and for treble damages. The court held that the provisions of the Civil Aeronautics Act directly covered the dominant facts alleged and that the CAB consequently had primary jurisdiction. The action directly involves the economic conduct of air carriers, a matter subject to detailed and comprehensive regulation by the Board. The most troublesome problem in the case is, as Judge Edelstein pointed out, the fact that the CAB has no authority to award damages. The district court is thus not deprived of jurisdiction of a suit against air carriers for violation of the anti-trust laws. But the court is in no position to exercise its jurisdiction under the anti-trust laws until the Board has exercised its jurisdiction under the Civil Aeronautics Act. Consequently, even though the remedy of damages is not available to the plaintiff before the CAB, there must be preliminary recourse to that agency. See, similarly, *Interstate Natural Gas Co. v. Southern California Gas Co.,* 103 F.Supp. 317 (S.D. Cal. 1952).

The result of the case is a dualization of remedial justice similar to that required under *S.S.W., Inc. v. Air Transport Ass'n,* 191 F. 2d 658 (App. D.C. 1951), discussed in Vol. 4, No. 2, P. 44-5, of this Bulletin. The criticisms which are contained there of that decision apply with equal force to the instant case. It is all very well to assert that an administrative agency should have the exclusive primary jurisdiction over cases which fall within its particular field of competence. To demand prior resort to the agency in a case where it is powerless to grant the relief requested is, however, to require a dichotomization of justice, which results only in needless

duplication of effort on plaintiff's part. Why should two actions have to be brought on what is essentially one cause of action, when the court has the authority in the one proceeding to grant all of the relief which is requested?

It was these considerations which led another federal judge to refuse to follow the decision in the *S.S.W.* case in *Slick Airlines v. American Airlines*, 107 F. Supp. 199 (D.N.J. 1951, 1952). That case, like the *Apgar Travel* and *S.S.W.* cases, involved an action against an air carrier, alleging violations of the anti-trust laws, which sought triple damages and injunctive relief. Here, however, the court rejected the defense that the action had to be dismissed because the CAB had exclusive primary jurisdiction. "I am still unpersuaded at this stage of this litigation," Chief Judge Forman asserted, "that the accommodation of the two statutes and remedial provisions thereof would be better served by staying the proceedings in this case and remitting the plaintiff to the Board for the resolution of administrative problems. The heart of the complaint in this proceeding is that plaintiff has suffered monetary damage by reason of defendants' past activity in violation of the anti-trust laws, the remedy for which, in damages, is indisputably beyond the power of the Civil Aeronautics Board. The doctrine of the exhaustion of administrative remedies can therefore have no application here." (216).

It should be noted that, even in the federal courts, the primary jurisdiction doctrine has generally been held inapplicable where only a question of law has been involved. An illustration of this is to be found in *Louisville & N.R.Co. v. United States*, 106 F. Supp. 999 (W.D.Ky.1952). The court there held that, in an action by a railroad under the Tucker Act for the balance due on transportation charges on various freight charges, where the key question was whether the railroad had been made a common carrier of products composed partly of silver, the complaint was not subject to a motion to dismiss, as against the contention that the question was one requiring the exercise of administrative expertness. The determination of whether a railroad had been made a common carrier of products composed partly of silver, says the court, presents only a question of law, determinable by the court by construction of the pertinent rule and tariff classification. The distinction between law and fact upon which this decision is based stems, in its application to the primary jurisdiction doctrine, to the famous decision of Justice Brandeis in *Great Northern Ry. Co. v. Merchants' Elevator Co.*, 259 U.S. 285 (1922). The basis for the use of the distinction here is to be found in the bases of the primary jurisdiction doctrine itself. Under it, the courts are barred from primary consideration of matters committed to agencies because the latter have been set up by the legislature as experts to deal with such matters. Insofar as questions of law are concerned, these considerations do not apply. There, the advantages of *expertise* are with the courts, not the agencies.

Another primary jurisdiction case of interest is *Cepero v. Pan American Airways*, 195 F.2d 453 (1st Cir. 1952). It involved an action to recover wages allegedly due

under a collective bargaining agreement entered into between a union, to which plaintiffs belonged, and defendant carrier. The court refused to uphold defendant's contention that resort to the National Railroad Adjustment Board is a prerequisite to relief in the courts. This case, said Judge Woodbury, is analogous to *Moore v. Illinois Central R. Co.*, 312 U.S. 630 (1941). In that case, the Court had held that there is nothing in the Act which purports to take away from the courts jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. There is no reason, declared the instant court, why a suit to recover wages allegedly due under a collective bargaining agreement should stand on any different footing from one to recover for discharge in violation of such a contract. It, therefore, concluded, on the basis of the *Moore* case, that the courts may proceed at once to adjudication not only of the issue of wrongful discharge but also of the issue of wages due.

Exhaustion of Administrative Remedies.— With the trend which has been noted in the federal courts strictly to apply the primary jurisdiction doctrine should be noted a similar tendency with regard to the rule requiring the exhaustion of administrative remedies before recourse may be had to the courts. In the well-known *Myers* case (*Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41 (1938)), the Supreme Court had held that the rule was applicable even though it was claimed that the agency concerned had no jurisdiction under its enabling statute in the particular case. Two recent federal cases refuse to apply a different rule where *constitutional* rather than statutory lack of jurisdiction is alleged. The exhaustion of administrative remedies rule is applicable even though the plaintiff's constitutional rights are alleged to be violated. *Morgan v. United States*, 107 F. Supp. 501 (W.D.Ky. 1952). Nor, as the Court of Appeals for the Fifth Circuit expressed it, does this mean that the private party is left standing remediless, his constitutional rights invaded and taken away without his being afforded a judicial hearing. His day in court will come, after he presses his available remedies. For that day he must, as all others similarly situated must, wait with such fortitude and patience as he can muster. *Volney Felt Mills v. Le Bus*, 196 F. 2d 497 (5th Cir. 1951).

The result here is not compelled even by the rigorous interpretation of the exhaustion doctrine that has prevailed in the federal courts since the *Myers* case. Even if one feels that the holding in *Myers* is essential to effective administration, one may still seek to limit its application to cases where *statutory* jurisdiction is questioned. It is usually said that the *Myers* doctrine is necessary if the administrative process is adequately to carry out the tasks which the legislature has assigned to it. Otherwise, it is argued, the jurisdictional issue can be raised in most cases as a device to delay effective administrative action. But this surely does not apply with the same force where questions of *constitutional* jurisdiction are involved. Such questions can normally be raised in but a relatively few cases. Once the constitutionality of a particular statute is upheld, those subject to the act can no longer raise that issue, much as they might wish to do

so for the purpose of obstructing administrative efficiency. In addition, if the *Myers* case is based, as it is in large part, upon the judicial hesitancy to act in a particular case without the aid of administrative *expertise* as expressed in a prior agency decision, then this, too, should not operate where constitutional questions are concerned. The considerations which lead courts to defer to administrative determinations in most cases do not apply to such questions. With regard to them, the advantages of *expertise* are normally with the judge rather than the administrator.

The application of the exhaustion rule in the federal courts presupposes that the private party does not suffer any irreparable injury while he is resorting to the administrative process. If the administrative decision goes into effect, pending the resolution of an administrative appeal, it would seem that this condition is not satisfied. This was the basis for two actions in the federal courts to enjoin the effectiveness of rent reduction orders of Area Rent Directors, pending the decision of the landlords' appeal to the Director of Rent Stabilization. Relief was nonetheless denied in both cases, on the ground that the federal courts are completely barred from intervening in administrative-law cases until agency processes have been exhausted. *Osmond v. Riverdale Manor,* 199 F. 2d 75 (5th Cir. 1952); *Forrest Harmon & Co. v. Rottgering,* 106 F. Supp. 993 (W.D. Ky. 1952). The instant injunction, said Judge Dobie, in one of these decisions, falls within the general rule prohibiting the interference of courts before administrative remedies are exhausted. In other words, a party alleging hurt by the administrative order cannot perfect his administrative appeal from the order, and while that appeal is pending and before it is determined, obtain a court order maintaining the status quo and enjoining the enforcement of the administrative order until a determination is had on the administrative appeal. *Osmond v. Riverdale Manor,* 199 F. 2d at 77.

These cases are as good as any to illustrate the extreme position now taken by the federal courts with regard to the exhaustion rule. That rule is inexorably applied in the federal cases, even where lack of jurisdiction—constitutional or statutory—is alleged, on the theory that the private party is not injured by being required to wait until the stage of "final" agency action before access to courts is available. The possible loss of time and expense involved in resorting to administrative procedures are cavalierly dismissed as "part of the social burden of living under government." *Petroleum Exploration, Inc. v. Public Service Commission,* 304 U.S. 209 (1938). The cases just discussed show, however, that what is true of such injuries is now also true of the damage which may be suffered pending administrative appeals, where the agency action has immediate effect. This result is not required by the rule of the *Myers* case. It wholly overlooks the interests of those subject to administrative regulation.

Among other exhaustion cases which may be mentioned is *Jason v. Alger,* 104 F. Supp. 653 (D.C. 1952). It dealt with a suit by a government employee to enjoin readjudication by a Departmental Loyalty

Board of his loyalty to the Government of the United States. Plaintiff contended that a previous determination with regard to his loyalty was *res judicata* and barred the present loyalty proceeding. The court held, however, that plaintiff's suit was premature under the exhaustion rule. It may be that he will be vindicated by the administrative tribunals, or that those tribunals will rule favorably on his contention that the doctrine of *res judicata* is applicable, in either of which events no need would exist for resort to the court. Courts have no right to anticipate the final administrative decision. Plaintiff must await the exhaustion of his administrative remedies. It should be noted that a claim that the exhaustion rule was inapplicable to a case where administrative action was precluded by the doctrine of *res judicata* was similarly rejected by the Supreme Court in *SEC v. Otis & Co.*, 338 U.S. 843 (1949).

For a lengthy discussion of the exhaustion rule, see *Home Loan Bank Board v. Mallonee*, 196 F. 2d 336 (9th Cir. 1952).

Compare *Idaho Falls Bonded Produce Co. v. United States*, 107 F. Supp. 952 (Ct. Cl. 1952). (Government may not rely on failure to exhaust administrative remedies where it, itself, has taken the position that there was no administrative remedy available and its adversary has acceded to that contention).

Reviewable action.—Manhattan Const. Co. v. NLRB, 198 F. 2d 320 (10th Cir. 1952), dealt with the question of whether the action of the NLRB in declining to issue a complaint and go further with the proceeding, after an unfair labor practice charge had been filed with it by an employer, and the action of the General Counsel in approving the action of the Board, were subject to review. This was answered in the negative. Except as authorized by statute, said the court, a court of appeals does not have jurisdiction to review action of the NLRB. The relevant statute provides for review only of a "final order" of the Board. This refers exclusively to an order either dismissing a complaint in whole or in part or directing a remedy relating to an unfair labor practice. The charge filed by the employer here was not a complaint. It was not a pleading. Its function was merely to set in motion the machinery for an inquiry to determine whether a complaint should be issued. The refusal to issue a complaint does not constitute a final order subject to review.

Similarly, the refusal of the NLRB to issue a subpena duces tecum before a complaint has been issued is not a final order reviewable by a court of appeals. The denial of such pre-complaint subpena is a mere incident in the administrative investigation of the charge, which investigation itself is only incidental to the exercise of the power to issue a complaint. *Laundry Workers International Union v. NLRB*, 197 F. 2d 701 (5th Cir. 1952).

Standing.—Laughlin v. Reynolds, 196 F. 2d 863 (App. D.C. 1952), involved a petition for a writ of mandamus by a member of the bar of the District of Columbia to require the Commissioner of Public Buildings to evict the Bar Association of the District of Columbia from certain space occupied by it for library purposes in a building

which housed the federal district court. The court held that, neither as a member of the bar nor as a taxpayer, did petitioner have the standing necessary to maintain an action of this type.

More recently, in *Covington Mills v. Durkin,* 21 U.S.L. Week 2413 (D.C. 1953), it was held that textile mills have standing to seek review of an order of the Secretary of Labor under the Walsh-Healey Act raising the minimum wage payable under government textile contracts. While recognizing that a contrary result was required under *Perkins v. Lukens Steel Co.,* 310 U.S. 113 (1940), the court held that that decision was overturned by the Fulbright Amendment, which was added to the Walsh-Healy law by a rider to the Defense Production Act of 1952. There is no doubt that Congress intended to cure the rule of the *Lukens* case and open the door to plaintiffs such as these to the courts to obtain the very kind of relief they are seeking here.

Parties and Venue.—In *Mouton v. United States,* 106 F. Supp. 336 (W.D. Wash. 1952), an action against the United States to recover plaintiff's accrued and accruing salary and lump sum payment for annual leave in connection with his employment in a naval shipyard and for his reinstatement in the employment, in which the Secretary of the Navy and a member of the Civil Service Commission were joined as defendants, was held not maintainable in the district court in the Western District of Washington. As far as the Civil Service Commissioner was concerned, *Blackmar v. Guerre,* 342 U.S. 512 (1952), is controlling. And, with regard to the Secretary of the Navy, it is established that the heads of the Executive Departments are, as a general rule, amenable to suit only in the District of Columbia, the District of their official residence.

A number of other cases hold, in effect, that review actions can be brought only in the District of Columbia. They do this by requiring the action to be brought against the agency head, who can only be sued in Washington, rather than against the local official of the agency, who is most readily accessible to the individual seeking review. Such cases appear to distort the rule of *Williams v. Fanning,* 332 U.S. 490 (1948), where the Court greatly liberalized the requirement of parties in review proceedings in order to facilitate the bringing of review actions. They are justified only if the goal of our administrative law is to make review as inconvenient and expensive as possible to those aggrieved by agency action. If, on the contrary, our aim is to insure availability of review upon the widest possible basis, there is no reason why actions cannot be brought in the district most convenient to the private party. It is formalistic fiction to treat the agency head as a private citizen who can be sued only in the district of his residence. It would normally cause no hardship to require the agency to respond in any district court. But, as far as the individual is concerned, requiring him to go to Washington to seek justice may be enough to induce him to forego his right of review. Recent cases holding that the agency head is an indispensable party include: *Paolo v. Garfinkel,* 200 F. 2d 280 (3d Cir. 1952); *Navarro v. Landon,* 108 F. Supp. 922 (S.D.

Cal. 1952); *Chavez v. McGranery*, 108 F. Supp. 255 (S.D. Cal. 1952) (deportation); *Sellas v. Kirk*, 200 F. 2d 217 (9th Cir. 1952) (Secretary of Interior). Compare *Fahey v. O'Melveny & Myers*, 200 F. 2d 420 (9th Cir. 1952).

Jurisdictional fact.—Western Boat Bldg. Co. v. O'Leary, 198 F. 2d 409 (9th Cir. 1952), arose out of an action to enjoin the enforcement of a compensation award made under the Longshoremen's and Harbor Workers' Compensation Act. Appellants contended that the lower court erred in failing to according a *de novo* hearing on the question of whether the claimant was injured on navigable waters, asserting that this was a jurisdictional issue which the district court must decide anew under the doctrine of *Crowell v. Benson*, 285 U.S. 22 (1932). The court asserted that it did not understand *Crowell v. Benson* to afford a trial *de novo* as a matter of right under circumstances where there is no real issue of fact presented. Yet, even if the true rule is contrary to its impression, the court went on, it simply refused to invoke it where, as here, no worthwhile purpose would be served thereby. To do so would be to adhere to the superfluous and breed procrastination.

Constitutional fact.—Under the famous decision of the Supreme Court in *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920), a determination by the reviewing court upon its own independent judgment as to both law and facts is required when an administrative determination is attacked on constitutional grounds, as, for example, when a rate order is challenged on the ground that it is confiscatory. In *Baltimore & O. Ry. Co. v. United States*, 105 F. Supp. 631 (E.D.Mo. 1952), the court held that the *Ben Avon* doctrine did not include the right to a trial *de novo* on the question of confiscatory rates. The plaintiffs here, said Judge Harper, seek to relitigate a factual question involved in the proceeding before the Commission on which they initially elected not to present evidence. Correct practice requires that, in ordinary cases, all the pertinent evidence should be submitted to the Commission. The pertinent evidence on the issue of confiscation should have been submitted to the Commission but was not. Such testimony will not be received by the district court in this suit. It should be emphasized that this case, like most others which have dealt with the problem in the federal courts, does not even try to give an answer to the key question of the present status of the *Ben Avon doctrine*. All that it tells us is that a trial *de novo* is not required even where the constitutional issue of confiscation is raised. But *Ben Avon* does not demand such a *de novo* proceeding whenever so-called "constitutional facts" are involved. All it requires is independent review, though limited to the administrative record, of both law and fact in such cases.

Retroactive action.—The extent to which administrative agencies can make new law retroactively by adjudication is dealt with in *NLRB v. Guy F. Atkinson Co.*, 195 F. 2d 141 (9th Cir. 1952). It involved an NLRB order which declared respondent, an employer engaged in the construction and building industry, guilty of an unfair labor practice. Respondent relied upon a closed shop contract, which the Board held was

not a defense because the union with which it had been made was not the representative of respondent's employees. At the time the contract was made, the Board had refused to take jurisdiction in such cases, where the building and construction industry was involved. Respondent claimed that since the agreement was made and action thereunder taken at a time when the Board was refusing to exercise jurisdiction over the industry, an application of a contrary policy in this proceeding amounted to adjudging contrary to law actions, which, when taken, were not subject to the application of sanctions under the law. This, it was said, was the equivalent of a retroactive application of a newly adopted rule, and a denial of due process. According to the court, the problem presented was one of whether the Board, in pursuing an undoubted right to choose a policy in this regard, first, that it would refrain from taking jurisdiction in respect to the construction industry, and later, to announce a contrary policy, was essentially exercising a legislative function, and announcing a rule for action in the future. If the statement of the earlier policy was in effect an announcement governing its future action, was its withdrawal of that statement, or reversal of the earlier policy required to have future effect only? Must it be denied retroactive effect?

Even if what is involved here, said the court, a change in administrative policy, is in substance a change in administrative rules, authority is not wanting that such altered rules may in some cases be applied retroactively. The second *Chenery* case, 332 U.S. 194 (1947), is cited in support of this proposition. The court held, however, that the *Chenery* doctrine was inapplicable to this case. The practical operation of the Board's change of policy, said Judge Pope, was to work hardship upon respondent altogether out of proportion to the public ends to be accomplished. The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing our system of law abhors. Though one may sympathize with the result reached in this case, it is difficult to conclude that the court's attempt to distinguish the second *Chenery* case is convincing. The issue there appears very similar to that here and the decision of the Supreme Court would appear to compel a result different from that reached by Judge Pope.

Investigatory Power.—The broadening of administrative investigatory power under the recent jurisprudence of the federal courts is once again illustrated in *Mines and Metal Corp. v. SEC,* 200 F. 2d 317 (9th Cir. 1952). It involved an action by the SEC for enforcement of its subpoenas. The private parties claimed that the Commission in such a proceeding had to affirmatively show violations, or probable violations, of its enabling act, before it had jurisdiction to proceed with its investigation. It was contended that the agency might proceed only if facts were established sufficient to show reasonable and probable cause, similar to that required for a search warrant. This view was sum-

marily rejected by the court. Repeated declarations of the Supreme Court, asserted Judge Pope, are to the contrary.

Power to Bring Actions.—In *NLRB v. New York State Labor Relations Board*, 106 F. Supp. 749 (S.D. N.Y. 1952), it was held that an administrative agency like the NLRB has implied authority to bring an action to protect its exclusive jurisdiction. The power of an agency to bring actions may be implied. The NLRB can petition the district court to enjoin a state agency from proceeding further with respect to certain unfair labor practice charges. The court will intervene to protect the exclusive jurisdiction of the National Board over the labor activities of enterprises whose activities affect interstate commerce. Such an action can be brought in the district court, since it does not involve an appeal from an order of the NLRB.

STATE DEVELOPMENTS

Administrative imposition of penalties.—The growth of administrative penal power is graphically illustrated by a recent New York statute. Chapter 595 of the Laws of 1952 of that State amends its Insurance Law by adding a new section, § 225, thereto, which provides that if the Superintendent of Insurance finds, after notice and hearing, that any insurer, representative of such insurer, agent or broker has wilfully violated any of the provisions of article 7 or article 9a of the Insurance Law relating to filings, he may, in lieu of any other penalty provided by law, order the violator to pay to the people of the state a penalty in a sum not exceeding $1,000 for each such offense. The failure of any such person to pay such penalty within thirty days after the making of such order, unless the latter is suspended by a court, shall constitute a violation of the provisions of this chapter. And, under section 5 of the Insurance Law, it should be noted, any such violation constitutes a misdemeanor.

It is difficult to imagine a statutory provision more repugnant to the basic principles upon which our administrative law is grounded. It violates the fundamental rule that the imposition of a money penalty is, with us, a judicial, not an administrative, function. The dangers inherent in allowing administrative authority to extend to the imposition of monetary penalties seem clear, and because of them, statutes like the New York law under discussion are comparatively rare, the usual thing being for the legislature itself to prescribe that the infraction of administrative rules or orders shall be subject to a stated penalty as a breach of the Act. This principle is said to date back to Stuart times and the objection to penalties imposed by royal proclamation. Under the newly enacted addition to the New York Insurance Law, we have an instance of the imposition of a penalty, not by Royal Proclamation, but by the prerogative of Alfred J. Bollinger, Superintendent of Insurance.

In addition, it should be noted that the New York statute contains no standards to guide the Insurance Superintendent in his imposition of penalties. This was the ground upon which such a provision was held invalid in *Tite v. State Tax Com-*

mission, 57 P.2d 734 (Utah 1936). And, in providing that the failure to pay a penalty constitutes a misdemeanor, the statute is infringing upon the principle that, with us, administrative "money judgments" are enforced by judicial proceedings, rather than by the criminal law. These criticisms of the new section are particularly relevant in view of the decision of the New York Court of Appeals in *Sagos v. O'Connell,* 93 N.E. 2d 644 (1950), under which a court may not review the measure of punishment imposed by an administrative agency. If its holding is applicable to § 225 of the Insurance Law, it means that the Superintendent's action is unreviewable, insofar as the amount of the penalty imposed is concerned.

Process of decision.—An interesting variation of the problem presented in the famous first *Morgan* case (*Morgan v. United States,* 298 U.S. 468 (1936)) was presented in a decision by the New York Court of Appeals. It involved the review of a determination of the State Liquor Authority revoking a restaurant liquor license. The charges against the licensee were tried at a hearing held before a deputy of the agency functioning as a hearing commissioner. The hearing extended over a period of three days. The hearing commissioner was of the opinion that the charges were sustained by the evidence, and he embodied his conclusions in a report wherein he summarized and analyzed the evidence. It did not appear when this report was referred to the Authority, but it was undisputed that within one hour after the conclusion of the hearing the Authority entered its order of revocation predicated on findings and conclusions identical to those recommended by its subordinate. The minutes of the testimony presented at the hearing were not actually transcribed by the stenographer until several days thereafter.

Upon these facts, the New York court held that the challenged administrative decision must be annulled. The determination of whether a liquor license is to be revoked must be made by the Authority itself, asserted Judge Fuld, and that function may not be delegated to any other body or individual. It is true, says he, reiterating what Chief Justice Hughes had conceded in the first *Morgan* case, that the agency in question may assign performance of much of the preliminary work to trained subordinates, such as the hearing commissioner in this case. In this case, however, the agency dispensed with a basic procedural requirement. In its haste to render a determination, it failed to await even transcription of the minutes of the hearing. Though the hearing officer may be authorized to summarize and sift the evidence for the convenience of the Authority, such a summary cannot take the place of the complete transcript. A report of the character here submitted—reflecting as it did the deputy's recollection of testimony given over a period of two days, covering more than 200 printed pages and not yet embodied in a transcribed record—is inherently inadequate. *Weeks v. O'Connell,* 107 N.E. 2d 290 (N.Y. 1952).

Compare *Vita-Pharmacals v. Board,* 243 P. 2d 890 (Cal. 1952) (rule of first *Mor-*

gan case not violated by delegation to committee of the board of duty to review evidence submitted at hearings, though it was admitted that the other members of the board had not read the evidence in its entirety).

Authority to reopen decisions.—The rule followed in some states that the right of an administrative agency to reopen and reconsider its decisions is limited to the period of time during which an appeal may be taken is rejected in a decision of the Appellate Division of the New Jersey Superior Court. In analogy to the authority of courts of general jurisdiction at common law, reads the opinion, administrative tribunals possess the inherent power of reconsideration of their judicial acts, except as qualified by statute. The denial to such tribunals of the authority to correct error and injustice and to revise their decisions for good and sufficient cause would run counter to the public interest. The power of correction and revision, the better to serve the statutory policy, is of the very nature of such governmental agencies. *Adolph v. Elastic Stop Nut Corp.*, 87 A. 2d 736 (N.J. 1952).

Primary jurisdiction.—Brennan v. Delaware, L. & W.R. Co., 103 N.E. 2d 532 (N.Y. 1952), involved a controversy between rival railroad unions as to which union was entitled to furnish employee-members to man certain railroad operations in the Buffalo district of defendant railroad company. Plaintiff union sought an injunction to enjoin the railroad from assigning the jobs in question to defendant union and a declaration as to the respective rights of the two unions to employment on the various "runs" described under its contract with the railroad. The Official Referee decided, on the basis of the New York Court of Appeals' decision in *Delaware, L. & W. R. Co. v. Slocum*, 87 N.E. 2d 532 (N.Y. 1949), that the court had jurisdiction and decided the case on the merits. The Appellate Division unanimously reversed and dismissed the complaint, holding, on the authority of the United States Supreme Court decision in the *Slocum* case, 339 U.S. 239 (1950), which reversed the determination of the New York court, that the state courts lacked jurisdiction of the controversy.

The New York Court of Appeals affirmed, on the ground that the case came within the exclusive primary jurisdiction of the National Railway Adjustment Board. Judge Fuld, whose dissent in the *Slocum* case had been upheld by the United States Supreme Court, delivered the opinion. Where an interpretation of their respective agreements is needed to determine which of two railroad unions is entitled to furnish employees for a particular job or jobs, stated Judge Fuld, the dispute is one envisaged by the Railway Labor Act and falls within the Adjustment Board's jurisdiction. Whatever authority the courts retain to determine the existence, validity or legality of contracts between railroads and their employees or the unions representing them, the determination here sought is of an entirely different sort, going beyond such matters and involving much more. The decision of this case necessarily involves an interpretation of the collective agreements of the unions with the railroad. "Interpretation," asserts the opinion, of course re-

quires presentation to the Adjustment Board.

Since the type of controversy here was similar to that in the *Slocum* case, it followed that the Board's jurisdiction of the present dispute was likewise exclusive. It should be noted that, in the present case, unlike the plaintiff in *Slocum*, the plaintiff union did, in fact, first proceed before the Adjustment Board. The Board had dismissed plaintiff's case with a direction that the question should be "adjusted" between the unions. Plaintiff sought redress in the courts only after the suggested adjustment efforts had failed. In Judge Fuld's view, the action taken by the Board did not render its jurisdiction one whit less exclusive. The Board's action was in no sense any adjudication of the merits of the controversy, and the failure of the suggested adjustment efforts did not justify the parties in foregoing further pursuit of their claims before the Board, in removing the controversy from the agency and litigating it in the courts.

What will happen, however, if, upon resubmission of the dispute to the Board, the latter still declines to decide the controversy? The Railway Labor Act provides neither for a review of the Board's dismissal of the claim, nor for a method to compel the Board to decide the merits. Despite this, Judge Fuld implied, the parties may not resort directly to the courts. "Even if that be so, we suggest that that follows from the provisions of the federal statute, its scheme and its design." (536). One wonders if the court is not going too far here. The requirement of primary resort to the administrative process, presupposes that there is, in fact, an effective administrative remedy. It should not be imposed where administrative failure to act renders such remedy futile and nugatory. As it has been aptly expressed by a federal judge, "If exhaustion of administrative remedies is demanded in a case like this, the result will be the exhaustion of litigants." *Lichten v. Eastern Air Lines*, 189 F. 2d 939, 948 (2d Cir. 1951).

Exhaustion of administrative remedies.— The hardship imposed upon private citizens by the federal application of the rule requiring the exhaustion of administrative remedies before recourse may be had to the courts (see discussion supra p. —) has led many of the states to refuse to follow the federal lead in this respect. New Jersey is among these states, and it expressly refused to follow the *Myers* case, 303 U.S. 41 (1938), in a significant 1949 decision. *Ward v. Keenan*, 70 A. 2d 77 (N.J. 1949). In the more recent case of *Nolan v. Fitzpatrick*, 89 A. 2d 13 (N.J. 1952), that state's highest court held that exhaustion of administrative remedies was not required where only questions of law were at issue. What are the requirements of justice in the instant case? asked Vanderbilt, C. J. The question presented is solely one of law. Any determination of that question by the administration would clearly be subject to judicial review. On such review of a question of law, the agency determinations would not be as persuasive as they would be on questions of fact. The only result of requiring an exhaustion of administrative remedies where only a question of law is in issue would be useless delay, and this

in the interest of justice should not be countenanced.

Standing.—The standing of a government contractor to bring a review action has been affirmed by the highest court of California in *Charles L. Harney, Inc. v. Contractors' State License Board,* — P.2d — (1952). The complaint there sought declaratory relief with regard to a rule adopted by defendant board, which subdivided all specialty contracting work into 31 classes and required a separate license to perform each class of work. The board informed plaintiff that all general engineering contractors, prior to bidding on, contracting for or performing any class of work referred to in the rule must apply for and obtain the specialty licenses required thereby. The various governmental agencies in the state had likewise been informed that general engineering contractors had no right to bid on, contract for or perform specialty construction work unless they were holders of the appropriate specialty licenses. The court held that the plaintiff's action was not subject to a motion to dismiss. It is unreal to say that plaintiff does not have a direct personal interest in challenging the rule in question. Plaintiff is qualified to perform specialty work, if the rule is invalid. He is prohibited by the rule from undertaking any contract therefor without obtaining a specialty license. He is, therefore, an interested party within the meaning of the statute authorizing the bringing of review actions. The instant case should be compared with *Perkins v. Lukens Steel Co.,* 310 U.S. 113 (1940), where a government contractor was held to lack standing. The approach of the California court seems the more desirable one, especially if one bears in mind that, in cases of this type, unless the contractor is held to have the necessary standing, it is most unlikely that the administrative action at issue will ever be challenged before the courts, even if it is blatantly illegal. For the present federal rule, see *Covington Mills v. Durkin,* supra p. —.

Constitutional fact.—A recent Massachusetts case indicates that the supposedly discredited doctrine of "constitutional fact" enunciated by *Ohio Valley Water Co. v. Ben Avon Borough,* 253 U.S. 287 (1920), is still far from defunct in the states. In *Lowell Gas Co. v. Dep't of Public Utilities,* 84 N.E. 2d 811 (Mass. 1949), the Massachusetts court had expressly followed *Ben Avon* and granted full review on both law and facts, where the constitutional issue of confiscation was raised. And, now, in *Opinion of the Justices,* 106 N.E. 2d 259 (Mass. 1952), that court has gone so far as to state that a legislative attempt to bar the *Ben Avon* doctrine would be unconstitutional. Where a rate established by a public regulatory body is attacked as confiscatory, the opinion of the court reads, the Massachusetts Constitution, and seemingly still that of the United States, require that there be a full opportunity for judicial review as to both fact and law. Referring to *Ben Avon* and its reaffirmation in *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38 (1936), the court stated, "Notwithstanding the criticism of these two Supreme Court decisions, and notwithstanding assertions from various apparently competent sources that they are no longer law, we have not been able to discover when and where they have been

overruled. One writer announces that the doctrine of these cases has 'gradually died' because of subsequent decisions inconsistent with it . . . . Perhaps so, but we would prefer to see the death certificate." It should be noted that, even if the court is not correct in its view concerning the continued vitality of *Ben Avon* as a federal doctrine, that does not affect the soundness of its decision under the Massachusetts Constitution. Even if the United States Supreme Court should expressly overrule *Ben Avon,* that will not invalidate decisions like this one under which the *Ben Avon* doctrine is held by the highest court of a state to be a requirement of judicial review under the provisions of the state Constitution.

LITERATURE

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BY-LAWS OF THE SECTION OF ADMINISTRATIVE LAW

ARTICLE I

Section 1. This Section shall be known as the Section of Administrative Law.

Section 2. The purpose of this Section shall be to promote the sound development of local, state and federal administrative law, procedure, and practice.

ARTICLE II

Membership

Section 1. Each member of the Section shall pay to the American Bar Association annual dues of five dollars. Any member of the Association, upon request to the Secretary of the Association and upon payment of dues for the current year, shall be enrolled as a member of this Section. Thereafter said dues shall be paid in advance each year beginning on the July first next succeeding such enrollment. Any member of this Section whose annual dues shall be more than six months past due shall thereupon cease to be a member of this Section. Members so enrolled and whose dues are so paid shall constitute the membership of this Section.

ARTICLE III

Officers

Section 1. The officers of this Section shall be a Chairman, Vice-Chairman and Secretary.

Section 2. There shall be a Council which shall consist of the Chairman, the last retiring chairman, the Vice-Chairman, and the Secretary, all of whom shall be members ex officio, together with eight other members to be elected by the Section as hereinafter provided.

Section 3. The Chairman, Vice-Chairman and Secretary shall be nominated and elected in the manner hereafter provided, and shall hold office for a term of two years thereafter, and until their successors shall have been elected and qualified; Provided,

That, the Chairman, Vice-Chairman and Secretary nominated and elected at the annual meeting at which this amendment to the By-Laws of the Section of Administrative Law shall be adopted shall hold office for the term of two years specified in this amendment, in the event such amendment becomes effective upon approval of the House of Delegates in accordance with Article IX of these By-Laws.

Section 4. At the annual meeting of the Section at which these by-laws shall have been adopted two members of the Council shall be nominated and elected to serve for one year; two, for two years; two, for three years; and two, for four years. ("Year", as herein used, meaning a term beginning at the close of the annual meeting at which they shall have been elected and ending at the close of the first, second, third, and fourth succeeding annual meeting of this Section, respectively). Thereafter, upon the expiration of each of these initial terms, two members of the Council shall be elected at each annual meeting of the Section, for terms of four years beginning at the close of the annual meeting at which they shall have been elected, and ending at the close of the fourth succeeding annual meeting of the Section.

Section 5. No person shall be eligible for election as a member of the Council if he is then a member of the Council and has been such member continuously for a period of three years or more.

Section 6. If any elected member of the Council shall fail to attend two successive meetings of the Council, the office held by such member shall be automatically vacated, and the Council shall fill the vacancy for the unexpired term.

PROVIDED, that if at the time these by-laws shall be adopted the Section shall then have eight members of the Council, each elected for a term of four years, so staggered that the terms of only two such members of the Council shall expire at the end of any one year, then and in that event upon the adoption of these by-laws the Section shall nominate and elect only two members of the Council for terms of four years, and thereafter two members of the Council shall be elected at each annual meeting of the Section for terms of four years beginning and ending as herein-above provided.

(This proviso clause appears in the original by-Laws of the Section as a part of Article III, Section 4)

ARTICLE IV

Nomination and Election of Officers

Section 1. Nominations. At the first session of the annual meeting the Chairman shall appoint a Nominating Committee of three members of the Section not members of the Council, which Committee shall make and report nominations to the Section each even-numbered year for the offices of Chairman, Vice-Chairman, Secretary and Section Delegate and each year for members of the Council, to succeed those whose terms will expire at the close of the then annual meeting and to fill vacancies then existing for unexpired terms except in the case of the Section Delegate whose selection is made by the Council in accordance with Article VI, Section 3 of these By-Laws. Other nomina-

tions for the same offices may be made from the floor.

Section 2. Elections. All elections shall be by written ballot unless otherwise ordered by resolution duly adopted by the Section at the annual meeting at which the election is held.

Section 3. If a vacancy occurs in any office after the person has been duly elected and qualified, the Council may fill such vacancy, the person so selected to serve until the next annual meeting except in the case of the Section Delegate who shall serve for the remainder of the term.

ARTICLE V

Duties of Officers

Section 1. Chairman. The Chairman shall preside at all meetings of the Section and of the Council. He shall formulate and present at each annual meeting of the American Bar Association a report of the work of the Section for the then past year. He shall perform such other duties and acts as usually pertain to his office.

Section 2. Vice-Chairman. Upon the death, resignation or during the disability of the Chairman, or upon his refusal to act, the Vice-Chairman shall perform the duties of the Chairman for the remainder of the Chairman's term except in case of the Chairman's disability and then only during so much of the term as the disability continues.

Section 3. Secretary. The Secretary shall be the custodian of all books, papers, documents, and other property of the Section, except money. He shall keep a true record of the proceedings of all meetings of the Section and of the Council, whether assembled or acting under submission. With the Chairman, he shall prepare a summary or digest of the proceedings of the Section at its annual meeting for publication in the Annual Report of the American Bar Association, after approval by the Association's Committee on Publications. He, in conjunction with the Chairman, as authorized by the Council, shall attend generally to the business of the Section. He shall keep an accurate record of all moneys appropriated to and expended for the use of the Section.

ARTICLE VI

Duties and Powers of the Council

Section 1. The Council shall have general supervision and control of the affairs of the Section subject to the provisions of the Constitution and by-laws of the American Bar Association and the by-laws of this Section. It shall especially authorize all commitments or contracts which shall entail the payment of money, and shall authorize the expenditure of all moneys appropriated for the use or benefit of the Section. It shall not, however, authorize commitments or contracts which shall entail the payments of more money during any fiscal year than the amount which shall have been previously appropriated to the Section for such fiscal year.

Section 2. The Council may authorize the Chairman to Appoint committees from Section members to perform such duties and exercise such powers as the Council

may direct, subject to the limitations of these By-laws and the By-laws of the American Bar Association.

Section 3. The Council, during the interim between annual meetings of the Section, may fill vacancies in its own membership or in the office of Secretary or, in the event of a vacancy in both the office of Chairman and Vice-Chairman, then in the office of Chairman. Members of the Council and officers so selected shall serve until the close of the next annual meeting of the Section.

Section 4. All binding action of the Council shall be by a majority vote of the whole Council.

Section 5. Members of the Council when personally present at a meeting of the Council shall vote in person, but when absent may communicate their vote, in writing, upon any proposition, to the Secretary and have it counted, with the same effect as if cast personally at such meeting.

Section 6. The Chairman of the Section may, and upon the request of any member of the Council shall, submit or cause to be submitted in writing, to each of the members of the Council, any proposition upon which the Council may be authorized to act, and the members of the Council may vote upon such proposition or propositions so submitted, by communicating their vote thereon, in writing over their respective signatures, to the Secretary, who shall record upon his minutes each proposition so submitted, when, how, at whose request same was submitted, and the vote of each member of the Council thereon, and keep on file such written and signed votes. If the votes of a majority of the members of the Council so recorded shall be in favor of such proposition or if such majority shall be against such proposition, such majority vote shall constitute the binding action of the Council.

ARTICLE VII

Meetings

Section 1. The annual meeting of the Section shall be held during * the annual meeting of the American Bar Association, in the same city or place as such annual meeting of the American Bar Association, with such program and order of business as may be arranged by the Council.

Section 2. Special meetings of the Section may be called by the Chairman upon approval of the Council, at such time and place as the Council may determine.

Section 3. The members of the Section present at any meeting shall constitute a quorum for the transaction of business.

Section 4. All binding action of the Section shall be by a majority vote of the members present.

ARTICLE VIII

Miscellaneous Provisions

Section 1. The Fiscal Year of the Section shall be the same as that of the American Bar Association.

Section 2. All bills incurred by the Section, before being forwarded to the Treas-

* Original standard by-laws read "immediately preceeding."

urer of the American Bar Association for payment, shall be approved by the Chairman or the Secretary, or, if the Council shall so direct, by both of them.

Section 3. No salary or compensation shall be paid to any officer, councillor or member of a committee.

Section 4. Any action by this Section must be approved by the American Bar Association before the same becomes effective as the action of the American Bar Association. Any resolution adopted or action taken by this Section may on request of the Section be reported by the Chairman of the Section to the annual meeting of the American Bar Association for the Association's action thereon.

Section 5. These by-laws shall become effective upon the approval thereof by the House of Delegates upon recommendation of the Board of Governors of the American Bar Association and by this Section.

Section 6. All printing for the Section or for the Council or any committee of the Section shall be done under the supervision of the headquarters office of the American Bar Association.

ARTICLE IX

Amendments

These by-laws may be amended at any annual meeting of the Section by a majority vote of the members of the Section present and voting, provided such proposed amendment shall first have been approved by a majority of the Council and provided, further, that no amendment so adopted shall become effective until approved by the House of Delegates upon recommendation of the Board of Governors of the American Bar Assoociation.

BUILDING CAMPAIGN FUND

Members of the bar are giving an unusual amount of attention to the American Bar Center planned to begin building in Chicago early next summer. This institution is designed to furnish a national center for research in the law and to supply a headquarters for the American Bar Association and organizations of the legal profession affiliated with that Association.

One building will house the headquarters and another will constitute a "Service Center" for the entire profession. In the latter will be assembled, for the first time in one place, a library of all publications of State and local bar associations and other units of the organized bar. This collection is expected, eventually, to house this so often ephemeral output of the lawyers in the principal countries of the Free World.

Research, to be piloted in this second building, will include projects for the Sections and Committees of the American Bar Association and affiliated organizations. The Center will also be a clearing house for studies by other groups, including State and local bar associations and law schools. The activity is designed to bring about closer coordination and avoidance of duplication in research.

The American Bar Foundation, whose officers are officers of the American Bar

Association, has been created to direct this Bar Center and to campaign for contributions. Heading the drive for contributions from the bar is a Finance Committee, chairmaned by George Maurice Morris of Washington, D. C., a former president of the American Bar Association. Campaign directors have been selected in each of the States, in Alaska, and Canal Zone, Hawaii, the Philippine Islands, Puerto Rico, and the District of Columbia.

The lawyers will be asked for $1,500,000, to construct the two buildings which will constitute the Center, and to launch initial projects. The remainder of the $2,000,000 required to erect the Center structures is on hand due to a bequest of William Nelson Cromwell of New York and to prior contributions by the bar to the building fund. The University of Chicago has given the site.

A committee headed by Harold J. Gallagher of New York, a former president of the American Bar Association, is seeking an additional $1,500,000, from sources outside the profession.

The project has arrested attention not only because it is the most ambitious project which the unified legal profession has attempted anywhere in the world, but because its potentialities for affecting the public welfare appear to be so vast. An adequately-financed headquarters for the lawyers of the United States should develop their skills in their profession; it should improve their stature with the public. Advances in the fact-founded administration of justice, in legislation and in representative democratic government, are promised on a scale which does not now exist. The public welfare, the objective to which the profession is dedicated, is an obvious beneficiary.

Editor's Note: The foregoing item regarding the Building Campaign Fund was supplied by the Finance Committee of The American Bar Foundation.